

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

ALLYHA U.,

Claimant,

and

EASTERN LOS ANGELES
REGIONAL CENTER,

Respondent.

OAH Case No. 2011120400

DECISION

This matter came on regularly for hearing before Samuel D. Reyes, Administrative Law Judge, Office of Administrative Hearings, on January 3, 2012, in Alhambra, California.

Claimant's mother, Leonor G.,¹ represented Claimant.

Gerard A. Torres (Torres), Supervisor, Consumer Services Unit, represented Eastern Los Angeles Regional Center (Regional Center or Service Agency).

Oral and documentary evidence was received at the hearing, and the matter was submitted for decision.

ISSUE

Whether Regional Center should fund Claimant's extended respite at a residential facility or at Claimant's home.

¹ Initials have been used instead of family surnames in order to protect Claimant's privacy.

FACTUAL FINDINGS

1. Claimant is a 12-year-old Service Agency consumer with a qualifying diagnosis of mild mental retardation. She has Downs Syndrome. She resides with her parents, her grandparents, her 19-year-old sister, and her six-year-old brother. She has limited speech and often communicates her needs with sounds or signals.

2. Claimant suffers from several serious medical conditions. She has complex congenital heart disease, with diagnoses of unbalanced atrioventricular canal defect and hypertension. Her condition has impacted her oxygen levels and has led to multiple surgeries. She receives oxygen supplements as needed. She has Moyamoya disease, a condition in which arteries in the brain are constricted, which has already resulted in two strokes. She is regularly followed by cardiology, neurology, hematology, and endocrinology specialists. She is 4 feet tall and weighs 60 pounds.

3. Claimant presents with several challenging behaviors. She engages in tantrums two to three times per day, screaming and resisting adult directives. She grabs objects and puts some of them, such as crayons, pencils and pens, in her mouth. She has been grabbing breasts for no apparent reason. She engages in some self-stimulatory behavior, such as playing with a scarf or a string. She also resists medical examinations and treatments.

4. Claimant has no sense of danger and requires supervision for her safety. She is impulsive and attempts to use unsafe objects at home. She cannot be left alone outside the home because she does not watch for vehicles or other potential hazards. She is impulsive and tends to wander off. Her parents have made several modifications in the family home for Claimant's safety, such as sealing off the kitchen.

5. Claimant's bedroom has also been modified to meet her needs. Because of her small size, the bed mattress has been shortened. An oxygen monitor, a portable oxygen tank, and a blood pressure machine share space with her favorite toys and stuffed animals.

6. Claimant requires assistance with daily living tasks. She needs assistance to wash her face, brush her teeth, comb her hair, and bathe. She needs assistance to use the toilet, although she is improving in this area.

7. Claimant attends middle school in the East Whittier City School District, and is enrolled in a special day classroom. She attends class Monday through Friday for six hours per day. The school has a special emergency plan in place to meet Claimant's medical needs, which plan has been approved by her physician.

8. Because of her medical and developmental needs, Claimant requires constant supervision. During her multiple hospital stays, Claimant's parents have remained by her side. She has never been in the care or supervision of strangers unless a family member has been present.

9. Claimant's latest individual program plan (IPP), prepared following a meeting on March 22, 2011, contains a desired outcome for Claimant to continue to reside in her home, where she feels the most loved and most secure. In support of this goal, Service Agency agreed to fund 32 hours per month of respite.

10. Over the past few years, with greater frequency in the last two, Service Agency has also funded up to 21 additional hours of extended respite to allow Claimant's parents to take overnight trips. The parents have taken one or two days at a time, and Claimant's other family members, typically the grandparents and her older sister, have provided the respite while Claimant remains in the home.

11. Effective May 2, 2011, Service Agency changed its Out-of-Home Respite Services Purchase of Services Guidelines (POS Guidelines). The new POS Guidelines contain the following limitation: "In[-]home respite in lieu of out[-]of[-]home respite may be used only when there is no out[-]of[-]home respite arrangement available." (Exhibit 3, at p. 2.)

12. In November 2011, consistent with her prior custom and practice, Claimant's mother submitted a request for approval of extended in-home respite in lieu of out-of-home respite. Her service coordinator denied the request, informing Claimant's mother that the new policy required Claimant's placement in a community care facility for receipt of out-of-home respite. Claimant's mother was not offered a specific facility to leave Claimant during the respite period, and her input about potential placements was not solicited.

13. Torres explained that once a request for out-of-home respite is approved, the Claimant's information is given to a coordinator who endeavors to match the consumer's needs with those of available facilities.

14. On November 2, 2011, Service Agency issued a Notice of Proposed Action, stating that Service Agency policy had changed following changes in state law. Under the new policy, out-of-home respite had been offered in a state licensed facility, and extraordinary circumstances did not exist to warrant in-home respite in lieu of out-of-home respite in Claimant's case. Because the family had not received the new POS Guidelines, Service Agency agreed to fund the November 2011 request, but refuses to provide future in-home respite in lieu of out-of-home respite. Claimant's mother filed a Fair hearing Request on November 16, 2011.

LEGAL CONCLUSIONS

1. In enacting the Lanterman Developmental Disabilities Services Act (Lanterman Act), Welfare and Institutions Code² section 4500 et seq., the Legislature accepted its responsibility to provide for the needs of developmentally disabled individuals, and recognized that services and supports should be established to meet the needs and choices of each person with developmental disabilities. (Welf. & Inst. Code, § 4501.) Appropriate services and supports include respite services. (Welf. & Inst. Code, § 4512, subd. (b).)

2. The Lanterman Act gives regional centers, such as Service Agency, a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Thus, regional centers are responsible for developing and implementing IPPs, for taking into account consumer needs and preferences, and for ensuring service cost-effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

3. In accordance with the IPP process, Service Agency and Claimant's family have agreed on the need for respite services and for extended respite. The latter has been provided in the home in lieu of at a licensed state facility. No evidence was presented to establish that Claimant's needs have changed or that the extended respite hours are no longer appropriate. On the contrary, the hearing record amply supports the need for the respite services.

4. In 2009, the Legislature enacted section 4686.5, which limits regional centers' ability to fund respite services. In pertinent part, the statute provides:

“(a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, all of the following shall apply:

“(1) A regional center may only purchase respite services when the care and supervision needs of a consumer exceed that of an individual of the same age without developmental disabilities.

“(2) A regional center shall not purchase more than 21 days of out-of-home respite services in a fiscal year nor more than 90 hours of in-home respite services in a quarter for a consumer.

“(3)(A) A regional center may grant an exemption to the requirements set forth in paragraphs (1) and (2) if it is demonstrated that the intensity of the consumer's care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home, or there is an extraordinary event that impacts the family member's ability to meet the care and supervision needs of the consumer. . . .”

² All further statutory references are to the Welfare and Institutions Code.

The statute therefore sets caps of 30 hours of respite services per month and 21 days of out-of-home respite per year, unless the “intensity of the consumer’s care and supervision needs are such that additional respite is necessary to maintain the consumer in the family home” or “there is an extraordinary event that impacts the family member’s ability to meet the care and supervision needs of the consumer.” (Welf. & Inst. Code, § 4686.5, subd. (a)(3)(A).) Claimant’s family is not seeking a higher number of hours of respite services or out-of-home respite. Rather, her parents seek to retain Claimant in her own home while they take much-needed respite one or two days at a time. Neither section 4686.5 nor any other provision of the statute expressly prohibits in-home respite in lieu of out-of-home respite, and Service Agency has funded the service in the past.

5. Service Agency continues to fund in-home respite in lieu of out-of-home respite in some circumstances. As set forth in factual finding number 11, the new POS Guidelines permit the service “only when there is no out[-]of[-]home respite arrangement available.” Claimant has multiple needs and is medically fragile. Her home has been modified for her safety and comfort. She has never been in the care of any nonfamily member in her life, and it is unclear that she will be able to stay away from home without family support even for a day or two. Her family’s reluctance to leave their child with unknown and unidentified providers is thus reasonable. Provision of the extended respite services in the home is therefore more appropriate and may be the only option with which Claimant and the family are comfortable. While Service Agency expects that an appropriate out-of-home placement will be found, no specific facility was discussed and the family’s preferences regarding a potential facility were not solicited. It was not established at the hearing that such out-of-home respite arrangement will in fact be available. In the existing circumstances, an out-of-home respite arrangement is not actually available for Claimant.

6. Service Agency argues that the family is responsible for providing support and respite for the parents to go on short overnight trips, just as any family with children without disabilities is expected to do. However, Claimant’s developmental and other needs, which are amply demonstrated in the record and which have been recognized by Service Agency in the IPP and in the funding of respite services over the years, exceed those of a child without disabilities. Therefore, under the Lanterman Act Service Agency is responsible for providing services and supports to meet this greater need.

7. Continued funding of in-home respite in lieu of out-of-home respite is therefore appropriate, by reason of factual finding numbers 1 through 14 and legal conclusion numbers 1 through 6.

//
//
//
//
//

ORDER

Claimant's appeal is granted, and Service Agency shall continue to fund in home respite in lieu of out of home respite in accordance with this Decision.

Dated: _____

SAMUEL D. REYES
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision in this matter and both parties are bound by this Decision. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.